Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–115–07 OF 2018
MOHD NAZLAN J
8 OCTOBER 2018

Civil Procedure — Judgments and orders — Pre-trial gag order — Ex-Malaysian Prime Minister facing joint trial on seven criminal charges applied to High Court for order prohibiting anyone from publishing, discussing or commenting on charges or his impending trial — Whether accused satisfied test for grant of pre-trial gag order — Whether gag order infringed right to freedom of speech and expression under art 10 of the Federal Constitution and breached the 'open justice' system advocated by s 15 of the Courts of Judicature Act 1964 — Whether scope of proposed gag order too wide to be sustained — Whether granting of gag order did not promote objective of law as instrument of justice

The High Court was moved in the instant application to issue a pre-trial gag order prohibiting any person from publishing or causing to be published in the broadcast media or by way of any other form of communication to the public at large any words, comments, discussions or statements which would suggest, conclude or infer that the accused/applicant, a former prime minister of Malaysia, had undertaken, or was guilty of, any of the acts stated in seven criminal charges that he was charged with and which were to be tried jointly. Four of the charges against the accused fell under the Penal Code and the Malaysian Anti-Corruption Commission Act 2009 while the remaining three fell under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. The accused said he was not against reports and articles which were fair, factually accurate, published contemporaneously and made in good faith but wanted to prevent publications that contained opinions as to his guilt or innocence or regarding his or his witnesses' character and discussions that predicted or could influence the outcome of the trial. The accused contended, inter alia, that if there was unrestrained discussion in the media, including the social media, about the charges and the trial, there was a substantial risk that he would not have a fair trial as not only witnesses but the trial judge as well might be unconsciously affected by what they had seen, heard and read. In resisting the application, the prosecution argued, inter alia, that a gag order infringed art 10 of the Federal Constitution and breached the 'open justice' system practised in the country. The prosecution also said that a gag order could not prevent foreign media and journalists from discussing the case and was not required to prevent any substantial risk of prejudice to the administration of justice since the outcome of the trial was decided by a single judge and not by a lay jury. It was also

submitted that the accused had alternative remedies under the law of contempt and defamation if he found his interests threatened or adversely affected.

Held, dismissing the application:

(1) The courts in this country had the jurisdiction, founded on art 126 of the Federal Constitution, to make an order in the nature of a prior restraint against prejudicial discussions or publications affecting a fair trial and the due administration of justice. An applicant for such a gag order, however, had the burden of showing that the threat of a real and substantial risk of serious prejudice to the administration of justice was immediate, that no other alternative remedies were available to him and that the granting of a gag order was proportionate with reference to the competing interests of free speech and the risk of prejudice to a fair trial (see paras 42 & 60).

(2) The accused had not established, despite the many exhibits, that the extensive media publicity concerning the criminal charges against him posed an immediate threat of a real and substantial risk of serious prejudice to the administration of justice in his impending trial especially when such a risk was considerably diluted and very much diminished by the absence of jury trials in Malaysia (see para 115).

(3) Alternative and effective measures other than in the nature of a prior restraint were readily available to the accused in the form of remedies under the laws of contempt and defamation to deal with any substantial risk of prejudice or interference with the criminal justice system or the due administration of justice in the trial (see para 116).

(4) The specific terms of the gag order applied for, if granted, would for all intents and purposes, represent a major incursion on the constitutional right of freedom of expression and speech under art 10 of the Federal Constitution and was tantamount to an unjustified departure from the 'open justice' principle advocated under s 15 of the Courts of Judicature Act 1964. If granted, the gag order would be difficult to sustain given the unduly wide scope of its intended prohibition which, in effect, was targeted at the whole world. This was quite apart from the technical flaw that the scope of the proposed gag order as stated in the accused's notice of motion was inconsistent with and significantly wider than what was affirmed in his affidavit in support of the motion. A gag order in the instant case did not promote the objective of the law as an instrument of justice (see paras 117–119).

[Bahasa Malaysia summary

Mahkamah Tinggi telah dipindahkan dalam permohonan ini untuk mengeluarkan perintah sekatan pra-perbicaraan melarang mana-mana orang daripada menerbitkan atau menyebabkan penerbitan dalam media siaran atau dengan cara apa-apa bentuk komunikasi lain kepada orang awam secara

keseluruhan apa-apa perkataan, komen, perbincangan atau kenyataan yang mencadangkan, menyimpulkan atau membuat kesimpulan bahawa tertuduh/pemohon, bekas perdana menteri Malaysia, telah melakukan, atau bersalah, daripada perbuatan yang dinyatakan dalam tujuh tuduhan jenayah yang beliau didakwa dan yang akan dibicarakan bersama. Empat tuduhan terhadap tertuduh jatuh di bawah Kanun Keseksaan dan Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 manakala tiga yang lain jatuh di bawah Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001. Tertuduh menyatakan bahawa beliau tidak bertentangan dengan laporan dan artikel yang mana adalah adil, tepat, diterbitkan secara serentak dan dibuat dengan niat baik tetapi ingin mencegah penerbitan yang berisi pendapat tentang kesalahannya atau ketidak bersalahannya atau mengenai watak dan perbincangan saksinya yang diramalkan atau boleh mempengaruhi hasil perbicaraan. Tertuduh berpendapat, antara lain, bahawa jika terdapat perbincangan yang tidak terkawal di media, termasuk media sosial, mengenai tuduhan dan perbicaraan, terdapat risiko besar yang beliau tidak akan mempunyai perbicaraan yang adil bukan sahaja sebagai saksi tetapi hakim perbicaraan juga mungkin dengan tidak sedar terjejas oleh apa yang mereka lihat, dengar dan baca. Dalam menentang permohonan itu, pihak pendakwaan berhujah, antara lain, bahawa perintah sekatan melanggar perkara 10 Perlembagaan Persekutuan dan melanggar sistem 'keadilan terbuka' yang diamalkan di negara ini. Pihak pendakwaan juga menyatakan bahawa perintah sekatan tidak dapat menghalang media asing dan wartawan daripada membincangkan kes itu dan adalah tidak diperlukan untuk mencegah sebarang risiko prejudis yang besar untuk menjejaskan pentadbiran keadilan kerana keputusan perbicaraan diputuskan oleh seorang hakim dan bukan oleh seorang juri awam. Ia juga telah mengemukakan bahawa tertuduh mempunyai remedi alternatif di bawah undang-undang penghinaan dan fitnah jika beliau mendapati kepentingannya terancam atau terjejas teruk.

Diputuskan, menolak permohonan:

(1) Mahkamah-mahkamah di dalam negara ini mempunyai bidang kuasa yang diasaskan pada perkara 126 Perlembagaan Persekutuan, untuk membuat suatu perintah dalam keadaan sekatan sebelum terhadap perbincangan atau penerbitan yang memudaratkan atau penerbitan yang mempengaruhi perbicaraan yang adil dan pentadbiran keadilan yang sewajarnya. Walau bagaimanapun, permohonan untuk perintah sekatan itu mempunyai beban untuk menunjukkan bahawa ancaman risiko sebenar dan besar prejudis secara serius terhadap pentadbiran keadilan adalah secara langsung, bahawa tiada alternatif remedi lain yang tersedia kepadanya dan bahawa pemberian perintah sekatan adalah berpadanan dengan merujuk kepada kepentingan kebebasan bersuara dan risiko prejudis terhadap perbicaraan yang adil (lihat perenggan 42 & 60).

(2) Tertuduh tidak membuktikan, walaupun dengan ekshibit yang banyak, bahawa publisiti media yang luas mengenai tuduhan jenayah terhadapnya menimbulkan ancaman risiko sebenar dan besar prejudis secara serius terhadap pentadbiran keadilan dalam perbicaraan yang akan datang terutama apabila risiko adalah sangat sedikit dan sangat berkurang dengan ketiadaan perbicaraan juri di Malaysia (lihat perenggan 115).

(3) Langkah-langkah alternatif dan berkesan selain daripada dalam keadaan sekatan sebelum adalah mudah didapati kepada tertuduh dalam bentuk remedi di bawah undang-undang penghinaan dan fitnah untuk menangani apa-apa risiko prejudis yang besar atau campur tangan dengan sistem keadilan jenayah atau pentadbiran wajar keadilan dalam perbicaraan (lihat perenggan 116).

(4) Terma-terma khusus perintah sekatan yang dipohon, jika diberikan, akan untuk semua maksud dan tujuan, mewakili serangan besar pada hak perlembagaan kebebasan ekspresi dan bersuara di bawah perkara 10 Perlembagaan Persekutuan dan sama seperti penolakan yang tidak adil dari prinsip 'keadilan terbuka' yang diajukan di bawah s 15 Akta Mahkamah Kehakiman 1964. Sekiranya diberikan, perintah sekatan akan menjadi sukar untuk dikekalkan memandangkan ruang lingkup yang terlalu luas bagi larangan yang dimaksudkan, yang sebenarnya, telah disasarkan di seluruh dunia. Ini adalah agak berbeza daripada kesilapan teknikal bahawa skop perintah sekatan yang dicadangkan seperti yang dinyatakan dalam notis usul tertuduh tidak konsisten dengan dan jauh lebih luas dari apa yang disahkan dalam afidavitnya untuk menyokong usul itu. Perintah sekatan dalam kes ini tidak menggalakkan objektif undang-undang sebagai instrumen keadilan (lihat perenggan 117–119).]

Notes

For cases on judgments and orders in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5499–5890.

Cases referred to

Attorney General v Times Newspapers Ltd [1973] 3 All ER 54; [1974] AC 273, HL (folld)

Attorney General v Leveller Magazine Ltd and others [1979] 1 All ER 745, HL (refd)

Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn [1981] 1 All ER 289, HL (refd)

Ex parte Telegraph plc and other appeals [1993] 2 All ER 971, CA (refd)

Hodgson and others v Imperial Tobacco Ltd and others [1998] 2 All ER 673, CA (refd)

Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago and

another; Trinidad and Tobago News Centre Ltd and others v Attorney General of Trinidad and Tobago and another [2005] 1 AC 190, PC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (folld)
Loot Ting Yee v Tan Sri Sheikh Hussain bin Sheikh Mohamed & Ors [1982] 1 MLJ 142, FC (refd)
Nebraska Press Association v Hugh Stuart 96 S Ct 2791 (1976), SC (refd)
R v Horsham Justices, ex parte Farquharson and anothe [1982] 2 All ER 269, QBD (refd)
R v Sarker and another [2018] 4 All ER 694; [2018] EWCA Crim 1341, CA (refd)
Sahara India Real Estate Corp Ltd & Ors v Securities & Exchange Board of India & another CA No 9813 of 2011, SC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur bt Ahmad Kamar & Anor [2012] 7 MLJ 657, HC (refd)
Vincent Ross Siemer v The Solicitor General [2013] NZSC 68, SC (refd)
WXIA-TV v State of Georgia 811 SE 2d 378 (Ga 2018), SC (refd)
Wallersteiner v Moir [1974] 3 All ER 217, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Constitution of India [IND] arts 19(2), 129, 215
Contempt of Court Act 1971 [IND]
Contempt of Court Act 1981 [UK] s 4(2)
Courts of Judicature Act 1964 ss 13, 15
Criminal Procedure Code s 418A
Federal Constitution arts 10, 10(1)(a), (2)(a), 121(1), 126
Malaysian Anti-Corruption Commission Act 2009
Penal Code

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K Kumaraendran (Geethan Ram Vincent and Revin Kumar with him) observer for Rosmah Mansor.

Mohd Nazlan J:

INTRODUCTION

[1] This is an application for an order to prevent the media and the public from discussing the merits of several criminal charges against the applicant until the conclusion of the trial proceedings.

[2] After having heard lengthy submissions by the prosecution and the defence, I delivered my decision to dismiss the application, and highlighted the principal reasons for the same. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[3] The applicant is the immediate former Prime Minister of this country. In the criminal proceedings to which the instant application relates, the prosecution has preferred a total of seven charges against the applicant. They were registered on two different dates, about one month apart. The applicant pleaded not guilty to all the charges and asked to be tried.

[4] Four charges for offences under the Penal Code and the Malaysian Anti-Corruption Commission Act 2009 were filed on 4 July 2018, and the remainder three charges, all for offences under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 were filed subsequently on 8 August 2018, when all seven charges were ordered to be jointly tried.

[5] On both dates, the charges had been initially filed at the sessions court; but these were immediately transferred on the same respective dates to the High Court pursuant to s 418A of the Criminal Procedure Code.

[6] When the applicant was charged on 4 July 2018, the presiding High Court judge in this Kuala Lumpur High Court (Criminal Court No 3) acceded to the applicant's oral application (strongly objected to by the respondent, then led by the attorney general), for an interim order prohibiting any publication and discussion on the merits of the four criminal charges against the applicant until disposal of the criminal trial. This prohibition is generally referred to as the gag order.

[7] In the arguments that preceded the granting of the interim gag order, the lead counsel for the applicant submitted that there had been unprecedented adverse publicity against the applicant that would prejudice a fair trial of the applicant as the accused.

[8] In his resistance to the application, the attorney general expressed regret that the prosecution had not been given notice of the defence's intention to make the application, disputed the constitutionality of the order vis a vis the right to freedom of speech and expression, and questioned the jurisdiction of the court in this application, also on account of the argument that the sub judice rule does no longer apply in Malaysia in the absence of jury trials.

[9] The presiding High Court judge had also directed that the defence should make a formal application within 14 days to enable the issues to be fully argued by both defence and prosecution, and ruled that the interim order would in any event expire on 8 August 2018, on which date the formal application would be heard.

[10] The applicant then filed a notice of motion on 18 July 2018 for a formal application for a gag order, in adherence to the direction of the court. On 8 August 2018 however, as mentioned earlier, the prosecution filed the additional three charges. These were read to the applicant before me in Kuala Lumpur High Court (Criminal Court No 3) following my transfer from Kuala Lumpur High Court (New Commercial Court No 1) effective 1 August 2018 as part of a transfer exercise involving judges, as directed by the Chief Judge of Malaya.

[11] Also, as the written submissions on the application for the gag order were only exchanged between the applicant and the respondent the day before, I agreed with the request of the parties for the hearing of the application for the gag order be fixed two days later on 10 August 2018. Hence the instant application before me.

SUMMARY OF CONTENTIONS OF PARTIES

[12] Both the defence as the applicant, and the prosecution as the respondent had prepared fairly lengthy written submissions. They also submitted at length at the hearing. For present purposes I wish only to highlight and summarise what the respective key assertions of the parties were.

[13] The applicant made it clear that he has no issue with accurate reporting and articles which are fair, factually accurate, and published contemporaneously and made in good faith. The principal objection is against publications containing opinions on the guilt or innocence of the applicant or on the character of the applicant and the witnesses, and discussions on the merits predicting or influencing the outcome of the trial.

[14] In his submission, the lead counsel for the applicant, focused on the jurisdictional authority of the court to make a gag order under the Federal

A Constitution, which was argued to be not dissimilar to the judicial powers in other Commonwealth jurisdictions, and on the contention that the gag order was necessary to prevent especially future sub judice materials and discussions from prejudging the matters like the criminal charges which are already now under the purview of the court.

B

[15] The applicant forcefully made the assertion that unrestrained trial by media, including the social media would not only place undue influence on the minds and ability of witnesses to give testimony truthfully, and result in unconscious effects on the trial judge in assessing the evidence and the C credibility of witnesses, but would also affect adversely on the integrity of the administration of justice as a whole.

[16] The applicant then examined various Commonwealth authorities, D particularly Indian, Canadian and English case laws on the subject and invited the court to grant the gag order as applied for on the basis of the following considerations. First, there was a risk of substantial prejudice to the applicant given the applicant's claim of the media furore surrounding his alleged criminal wrongdoings and the resulting public backlash having the effect of E presupposing the guilt of the applicant, affecting witness testimony, and the risk of the displacement of judicial power and due administration of justice in favour of pre-trial and prejudicial publicity.

F **[17]** Secondly, other than the gag order, there were no alternative measures that could instead be made to ensure the applicant receive a fair trial. An order for the trial to be delayed for instance would serve only to deny the applicant to the right of a speedy trial.

G **[18]** Thirdly, the gag order would be proportionate and not unfairly impinge upon the interest of free speech, and that it would be insufficient to merely weigh the right to freedom of expression by the media against the right of an accused to a fair trial since the latter has far reaching consequences for the liberty of an individual, like the applicant who stands accused of seven criminal H charges.

[19] The lead deputy public prosecutor, for the respondent, in its resistance to this application first submitted on a procedural attack that the notice of motion filed by the applicant was not supported by his affidavit in support. Its I more substantive objections are anchored on a number of arguments, chief among which was that the court does not have the jurisdiction to issue a gag order as sought by the applicant, and that neither was this a proper case for this court to invoke its inherent jurisdiction.

[20] The respondent maintained that there would in any event be no substantial risk of prejudice to the administration of justice, and there are other remedies available to the applicant to protect his interest as an accused.

[21] The respondent also made the argument that the gag order would infringe art 10 of the Federal Constitution and breach the open justice system. Further, the terms of the gag order would potentially not bind the international media, such that the order would have been granted in vain.

[22] A key riposte raised by the respondent is the submission that the rule of sub judice would be inapplicable in the instant case for the reason that the trial will be presided by a professional judge sitting alone in the absence of jury trials in this country.

EVALUATION AND FINDINGS OF THIS COURT

Jurisdiction to grant a gag order

[23] The first question of importance that in my view requires determination is whether the courts in this country have the jurisdictional authority to make a gag order. The objective of a gag order, like the one sought by the applicant in the instant application is to stop any publication and discussion on the merits of the criminal charges already filed against an accused in a legal proceedings.

[24] The prayers sought for by the applicant, as per the notice of motion are as follows:

NOTICE OF MOTION

[1] A direction be hereby issued that pending disposal of the proceedings in Kuala Lumpur High Court Arrest Case No: WA-45-2-07/2018 and Arrest Case No: WA-45-3-07/2018 ('the Proceedings'), any person who shall publish and/or cause to be published in the media, to wit any broadcast and/or other communication in whatever form which is addressed to the public at large or any section thereof, any words, comments, discussions and/or statements, which would suggest, conclude or infer that Dato' Sri Mohd Najib bin Hj Abd Razak has undertaken any of the acts outlined in the four (4) charges in the Proceedings, as annexed in *annexure A* hereof and/or is guilty of the offences outlined therein, shall be liable to being punished for contempt of this Honourable Court.

[2] An order be hereby granted that pending disposal of the Proceedings, no person shall publish and/or cause to be published in the media, to wit any broadcast and/or other communication in whatever form which is

addressed to the public at large or any section thereof, any words, comments, discussions and/or statements, which would suggest, conclude or infer that Dato' Sri Mohd Najib bin Hj Abd Razak has undertaken any of the acts outlined in the four (4) charges in the Proceedings, as annexed in *Annexure A* hereof and/or is guilty of the offences outlined therein;

[3] That the Applicant and the Respondent be at liberty to apply to enforce the order provided for herein; and

[4] Any further relief or order that this Honourable Court deems fit and proper to be given in the interest of justice.

[25] It will be readily appreciated that by its clear words the notice of motion seeks to bar any person from committing the acts specified in the notice of motion and to cite for contempt any person deemed to have committed the acts outlined therein. The scope is plainly wide. It is stated to be targeted against any person who publishes or communicates in whatever form any words, comments, discussions or statements which would suggest the applicant had undertaken any of the matters stated in the criminal charges filed against him. For completeness I should add that the applicant at the hearing also asked that the prayers be extended to the three new charges.

[26] The basis of this application is the legal concept of *sub judice*, which is Latin for 'under judgment' or 'under judicial consideration'. *Oxford Dictionary of Law* (7th Ed) defines the rule on *sub judice* as being 'a rule limiting comment and disclosure relating to judicial proceedings, in order not to prejudge the issue or influence the jury'.

[27] In theory, strictly, the status of a matter which is *sub judice* is neutral in legal effect. It is only when a *sub judice* matter is discussed or published in a manner that prejudges or prejudice the subject matter of the legal proceedings that it become objectionable. It is at this point that the law of contempt of court will become applicable to regulate *sub judice* and at the same time protect the integrity of the trial and the due administration of justice.

[28] It is not out of context for me to refer to what Lord Denning MR had said about this in *Wallersteiner v Moir* [1974] 3 All ER 217, which is always worthy of reiteration, as follows:

> I know that it is commonly supposed that once a writ is issued, it puts a stop to discussion. If anyone wishes to canvas the matter in the press or in public, it cannot be permitted. It is said to be *sub judice*. I venture to suggest that it is a complete misconception. The sooner it is corrected, the better. If it is a matter of public interest, it can be discussed at large without fear of thereby being in contempt. Criticisms can continue to be made and can be repeated. Fair comment

does not prejudice a fair trial. A

[29] Whilst the law of contempt is available in the corpus of the laws in this country to deal with *sub judice* matters which are contemptuous and objectionable, the issue now is that crucially, the relief sought for in the gag order by the applicant in the instant application is in the nature of a prior restraint or pre-emptive order. In other words, the applicant, in the above-stated prayer [2] of his notice of motion, intends to stop *future* discussion or publication that prejudices his right to a fair trial. B

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[30] As highlighted by the lead counsel for the applicant, the United Kingdom for example already enacted laws to address future prejudicial publication as found in s 4(2) of its Contempt of Court Act 1981, enabling the courts to make 'postponement orders' against publication. It is common ground that there are no specific provisions in the laws of Malaysia that authorise the granting of a gag order in the nature of a prior restraint or a pre-emptive order. D

[31] However, unlike in the UK, Malaysia has a written constitution, which is also the supreme law of the land. The source of the power of the courts in this country to exercise powers against contempt of court is embodied in art 126 of the Federal Constitution which clearly reads: E

> The Federal Court, the Court of Appeal, or a High Court shall have power to punish any contempt of itself. F

[32] Section 13 of the Courts of Judicature Act 1964 also contains almost identical provisions to art 126 of the Federal Constitution.

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[33] I am of the view that the prismatic approach of the construction of constitutional provisions formulated in the decision of the Federal Court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 is to be followed to the effect that the powers of contempt could also be exercisable by the courts pre-emptively and in pro-active fashion, and not have to wait for a contemptuous conduct to have been first committed. H

[34] In my view, this construction accords not only with common logic but also legal principles. There is nothing inherently inimical to having the contempt powers being exercised by the courts to prevent the contempt from happening. And after all, a court must be vested with the requisite powers to be able to act and make orders in order to maintain its character as a Court of justice (see the House of Lords decision in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn* [1981] 1 All ER 289). I

[35] At the same time there is also merit in the assertion that the authority to make a gag order could be characterised as one which conforms with the concept of judicial power, as its exercise is undertaken in consonance with the judicial process. In the landmark constitutional case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, Zainun Ali FCJ, delivering the judgment of the Federal Court held:

> [99] The case of *Public Prosecutor v Dato' Yap Peng* highlights that the exercise of judicial power carries two features. The first is that judicial power is exercised in accordance with the judicial process of the judicature.
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> This is also illustrated by Gaudron J, in *Wilson and Ors v The Minister For Aboriginal and Torres Strait Islander Affairs and Anor* (1996) 189 CLR 1 at p 22 when he said that:
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> > For the moment it is sufficient to note that the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the courts in which that power is vested. And public confidence depends on two things. *It depends on the courts acting in accordance with the judicial process*. More precisely, it depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process.
> >
> > So critical is the judicial process to the exercise of judicial power that it forms part of the definition of that power. Thus, *judicial power is not simply a power to settle justiciable controversies, but a power which must be and must be seen to be exercised in accordance with the judicial process*. (Emphasis added).

[36] The proposition that the courts are empowered to issue gag orders also finds strong support in the decision of the highest court in India which examined a similar issue, in the context of its constitutional provisions which read not dissimilarly to the Malaysian equivalent, as follows:

> Article 129 of the Constitution of India
>
> 129 Supreme Court to be a court of record The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself
>
> Article 215 of the Constitution of India
>
> 215 High Courts to be courts of record. Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

[37] It is of interest to note that like the UK, India too has a statute regulating matters on contempt, in the Contempt of Court Act 1971 which also does not

expressly embody powers to deal pre-emptively with potentially prejudicial publication. Yet, the decision of the Supreme Court of India in *Sahara India Real Estate Corp Ltd & Ors v Securities & Exchange Board of India & another* CA No 9813 of 2011, a landmark case in the area of securities laws, ruled that the courts have the power to make postponement orders to prevent prejudicial publication in appropriate cases.

[38] The following passage from the judgment of Chief Justice Kapadia which examined the relationship between the constitutional provisions on contempt in arts 129 and 215, and on the laws imposing reasonable restrictions over fundamental liberties in art 19(2), is instructive:

> 21. ... Thirdly, if one reads Article 19(2) with the second part of Article 129 or Article 215, it is clear that the contempt action does not exhaust the powers of the Court of Record. The reason being that contempt is an offence sui generis. Common law defines what is the scope of contempt or limits of contempt. Article 142(2) operates only in a limited field. It permits a law to be made restricted to investigations and punishment and does not touch the inherent powers of the Court of Record. Fourthly, in case of criminal contempt, the offending act must constitute interference with administration of justice. Contempt jurisdiction of courts of record forms part of their inherent jurisdiction under Article 129/Article 215. Superior Courts of Record have inter alia inherent superintendent jurisdiction to punish contempt committed in connection with proceedings before inferior courts. The test is that the publication (actual and not planned publication) must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. It is important to bear in mind that sometimes even fair and accurate reporting of the trial (say murder trial) could nonetheless give rise to the 'real and substantial risk of serious prejudice' to the connected trials. *In such cases, though rare, there is no other practical means short of postponement orders that is capable of avoiding the real and substantial risk of prejudice to the connected trials. Thus, postponement orders safeguard fairness of the connected trials. The principle underlying postponement orders is that it prevents possible contempt. Of course, before passing postponement orders, Courts should look at the content of the offending publication (as alleged) and its effect. Such postponement orders operate on actual publication. Such orders direct postponement of the publication for a limited period. Thus, if one reads Article 19(2), Article 129/Article 215 and Article 142(2), it is clear that Courts of Record 'have all the powers including power to punish' which means that Courts of Record have the power to postpone publicity in appropriate cases as a preventive measure without disturbing its content.* Such measures protect the Media from getting prosecuted or punished for committing contempt and at the same time such neutralizing devices or techniques evolved by the Courts effectuate a balance between conflicting public interests. It is well settled that precedents of this Court under Article 141 and the Comparative Constitutional law helps courts not only to understand the provisions of the Indian Constitution it also helps the Constitutional Courts to evolve principles which as stated by Ronald Dworkin are propositions describing rights (in terms of its content and contours) (See 'Taking Rights Seriously' by Ronald Dworkin, 5th Reprint 2010). The postponement orders is, as stated above, a neutralizing device evolved by the courts to balance

A interests of equal weightage, viz, freedom of expression vis a vis freedom of trial, in the context of the law of contempt. One aspect needs to be highlighted. The shadow of the law of contempt hangs over our jurisprudence. The media, in several cases in India, is the only representative of the public to bring to the notice of the court issues of public importance including governance deficit, corruption, drawbacks in
B the system. *Keeping in mind the important role of the media, Courts have evolved several neutralizing techniques including postponement orders subject to the twin tests of necessity and proportionality to be applied in cases where there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such orders would also put the Media to notice about possible contempt.* However, it would be open
C to Media to challenge such orders in appropriate proceedings. Contempt is an offence sui generis. Purpose of Contempt Law is not only to punish. Its object is to preserve the sanctity of administration of justice and the integrity of the pending proceeding. Thus, the postponement order is not a punitive measure, but a preventive measure as explained hereinabove. Therefore, in our view, such orders of
D postponement, in the absence of any other alternative measures such as change of venue or postponement of trial, satisfy the requirement of justification under Article 19(2) and they also help the Courts to balance conflicting societal interests of right to know vis-à-vis another societal interest in fair administration of justice. One more aspect needs to be mentioned. Excessive prejudicial publicity leading to usurpation of functions of the Court not only interferes with administration of
E justice which is sought to be protected under Article 19(2), it also prejudices or interferes with a particular legal proceedings. In such case, Courts are duty bound under inherent jurisdiction, subject to above parameters, to protect the presumption of innocence which is now recognised by this Court as a human right under Article 21, subject to the applicant proving displacement of such a
F presumption in appropriate proceedings. Lastly, postponement orders must be integrally connected to the outcome of the proceedings including guilt or innocence of the accused, which would depend on the facts of each case. For aforestated reasons, we hold that subject to above parameters, postponement orders fall under Article 19(2) and they satisfy the test of reasonableness. (Emphasis added.)

G

[39] In other words, in India, the making of prior restraints in the form of such postponement orders are justifiable in certain circumstances and constitute reasonable restrictions against fundamental rights and liberties which would be saved under art 19(2) of the Constitution of India.

H

[40] I am inclined to agree with the argument of the applicant that a similar position has been affirmed by the Supreme Court of New Zealand in the case of *Vincent Ross Siemer v The Solicitor General* [2013] NZSC 68. The relevant
I issue for present purposes was whether New Zealand courts have the inherent power or jurisdiction to make suppression orders, which in that case prohibited the judgment of the High Court on certain pre-trial rulings from being reported in the media. The majority ruled in the affirmative. The following passages from the majority judgment of the Supreme Court are of relevance:

[158] A suppression order can be made consistently with the New Zealand Bill of Rights Act where that represents the appropriate resolution of the tension between freedom of expression and fair trial rights. New Zealand courts have recognised that the right of freedom of expression supports contemporaneous discussion of events in the criminal justice process and must be taken into account along with the right of an accused person to a fair and public hearing by an independent court. Both values must be given serious consideration and, so far as possible, fair trial rights and freedom of expression should each be accommodated. But, where publication of certain information would give rise to a real risk of prejudice to a fair trial right, freedom of expression may be temporarily limited by a suppression order in order to avoid that risk. In our view, this approach properly recognises the special importance of fair trial rights.

[159] An interim ban, pending trial, on the publication of material which gives rise to a real risk of prejudice to a fair trial, is a reasonable limit on the s 14 right of freedom of expression. As a limit imposed by an order of court made under the common law, it is prescribed by law in terms of s 5. As well, the protection of fair trial rights is a sufficiently important objective to warrant a temporary limitation on freedom of expression. The requirement, before a suppression order can properly be made, that publication of the material would create a real risk of prejudice to a fair trial, ensures that suppression orders are only made where that is rationally connected to the objective of protecting fair trial rights. Fair trial rights are important and, where there is a real risk that they will be negated, a pre-emptive but temporary publication ban is a reasonable and proportionate limit on freedom of expression, to avoid that risk.186 The scope of such a suppression order (for example, the material suppressed or the duration of the order) should be defined in such a way that ensures freedom of expression is limited only to the extent reasonably necessary to preserve fair trial rights.

...

[169] Our discussion of the New Zealand cases indicates that, since the 1970s, New Zealand courts have exercised the power to make non-party suppression orders which go beyond anything provided for by statute. We have demonstrated that this power has not been extinguished by either the Criminal Justice Act or by any earlier enactment. Neither s 138 of the Criminal Justice Act nor the provisions in the Criminal Procedure Act purport to provide anything like a code in relation to non-party suppression orders. There is thus a pattern of legislative action and inaction founded on the assumption that the courts have the power to make non-party suppression orders. And the way in which criminal courts deal with pre-trial applications and appeals in part reflects an assumption that non-party suppression orders promote fair trial rights.

[41] Thus the New Zealand Supreme Court has ruled that a suppression order can be made consistently with the Bill of Rights Act where publication of the information would give rise to a real risk of prejudice to a fair trial right.

[42] In view of the provisions of our art 126 as I referred to earlier, and considering the position in the comparable jurisdictions of New Zealand and

particularly India, dealing with postponement orders and suppression orders which are not unlike the gag order sought herein, it is my judgment that the courts in this country have the jurisdiction founded on art 126 of the Federal Constitution to make an order in the nature of a prior restraint against prejudicial discussions or publications affecting a fair trial and the due administration of justice, subject to considerations I shall advert to next, but after summarising the concerns associated with *sub judice*.

Why sub judice publications may be objectionable

[43] It does not follow that the fact that the courts may be vested with the jurisdiction to grant a gag order necessarily means that the gag order applied for in the instant case before me ought to be allowed. As stated earlier, the test for the granting of a gag order must be met.

[44] One cannot disregard the risk of prejudice that could potentially be brought about by pre-trial publicity. To start with however, it is not disputed that it is generally considered improper for publications be made in respect of on-going court cases which are pending judicial determination. As stated earlier, *sub judice* is part of the law of contempt, which in turn is especially concerned with interference with the due administration of justice and the legal process which invariably extends to the right of an accused to a fair trial.

[45] The rule on *sub judice* therefore seeks to safeguard the sanctity of court proceedings and ensure a fair trial to an accused in a criminal trial. It is rudimentary that decisions on issues of fact and law should be immune from every irrelevant and extraneous consideration. Decisions should be on the basis of evidence produced in court, and nothing else.

[46] As such, publications and discussions cannot extend to pre-judging cases and encroaching into how certain issues already pending before the court ought to be addressed or decided by the court because that would prejudice the outcome of the proceedings and may constitute criminal contempt in the sense of such statements and publications presenting a real and substantial risk of interference with the legal process and the due administration of justice.

[47] A review of the relevant jurisprudence and literature suggests that the restrictions associated with the concept of *sub judice* are designed to deal with three not unrelated key considerations. First, to prevent persons involved in the proceedings such as witnesses and jurors from being influenced by the prejudicial publication; secondly to avoid prejudgment of court decisions; and thirdly, to stop others from usurping the judicial functions of the courts.

[48] The following observation by Lord Reid in the landmark House of

Lords decision in *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54; [1974] AC 273 is especially instructive:

> I think that anything in the nature of prejudgment of particular case or of specific issues in it is objectionable, not only because of its side effects on that particular case but also because of its side effects which may be far reaching. Responsible 'mass media' will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow, and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly. Most cases of prejudging of issues fall within the existing authorities on contempt. I do not think that the freedom of the press would suffer; and I think that the law would be clearer and easier to apply in practice if it is made a general rule that it is not permissible to prejudge issues in pending cases.

[49] It is a basic constitutional framework of this country that it is the judicial institution that deals with the issues presented before the courts for determination. And as *Semenyih Jaya* has recently reaffirmed, in this country, judicial power resides in the judiciary and no other and this continues to be enshrined in art 121(1) of the Federal Constitution. The judicial function cannot be usurped by others making public statements about for instance how issues and cases before the courts should be decided on.

[50] It is certainly not in the public interest to permit prejudicial publicity and publications that reflect on, adversely or otherwise — the alleged guilt as well as the innocence — of an accused in respect of issues pending before the court. Examples include disclosing the criminal history of an accused, commenting on the strength or weakness of the case of the parties or on the evidence of the witnesses or on their character and demeanour, or even publishing documents before they are tendered in court.

[51] Fair and accurate reporting of the facts and evidence already presented in any ongoing proceedings is therefore by definition not objectionable at all. That is acceptable for as long as the statements do not assume the role of the courts by pre-judging the issues and the cases before the courts.

The test for the granting of a gag order

[52] In this context, reference ought to be made to the former Federal Court decision in *Loot Ting Yee v Tan Sri Sheikh Hussain bin Sheikh Mohamed & Ors* [1982] 1 MLJ 142. In that case, a teacher sued the Education Service Commission and sought a ruling that a transfer order issued by the latter against him was void. Whilst the suit was pending, the Commission sent a notice for him to showcause as to why he should not be dismissed from the teaching service for non-compliance with the transfer order. The teacher

applied to commit the Commission for alleged contempt of court on account of the issuance of the show cause. The Federal Court affirmed the dismissal by the High Court.

[53] The following passages from the judgment of Raja Azlan Shah Acting LP (as HRH then was) merit reproduction for their relevance:

> The category of contempt we are concerned with is so well-known and reasonably well-established. Its object is to uphold the due administration of justice and in particular to protect the right to a fair and proper trial. According to Lord Diplock in *Attorney-General v Times Newspapers Ltd* (*supra* at page 72) the due administration of justice requires: (1) that all citizens should have unhindered access to the courts; (2) they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias and whose decision is based on all the available evidence properly admitted; (3) once a dispute has been submitted to the court, they should be able to rely on there being no usurpation by any person of the function of that court to decide it according to law. Conduct calculated to impair any one of the three requirements may be prosecuted for contempt.
>
> On behalf of the appellant it was argued that the conduct of the Education Service Commission in the 'publication' of the show cause notice is tantamount to 'usurpation by the Commission of the function of the court to decide the pending legal proceedings according to law'. Here lies the central issue raised in the present appeal. If it appears that the conduct, ie publication of the show cause notice, may influence or appear to influence the decision of that court or may affect the minds of witnesses, then it is objectionable. This category of contempt is based squarely on conduct which prejudges any issue pending before the court ...
>
> *We feel that the real question for the court in this case to decide whether there is contempt, is whether the risk of prejudice to a fair and proper trial of the pending legal proceedings is serious or real or substantial.* That is an application of the ordinary *de minimis non curatlex* principle — the law does not concern itself with trifles. Intent alone is insufficient to establish contempt (see *R v Ingrams & Ors, Ex parte Goldsmith* [1977] Crim LR 40).
>
> We are satisfied that the notice to show cause was merely a first step taken in the conduct of the proposed disciplinary proceeding against the appellant by the Education Service Commission in the proper exercise of its constitutional duties ... We feel that the appellant had acted prematurely when he applied to the High Court on September 29, 1980 under O 32(3) of the Rules of the High Court 1980 to commit the respondents for contempt.

[54] This Federal Court decision established that the test of contempt in the nature of *sub judice* (which is what it was in that case) in Malaysia is whether the risk of prejudice to a fair trial is serious or real or substantial. In a High Court decision in the case of *Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur bt Ahmad Kamar & Anor* [2012] 7 MLJ 657, another case involving arguments of *sub judice* vis a vis the considerations of constitutional right of freedom of expression, the test formulated in the Canadian Supreme Court was

approvingly referred to, in the following terms:

> [37] The Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corporation* (1995) 120 DLR 12 (a case highlighted to this court by Mr Tommy Thomas) has adopted, in my opinion, the correct approach in constitutional interpretation in the area of media freedom and freedom of expression generally. As such, the common law rule in relation to sub judice has to be molded accordingly in the light of fundamental liberties provisions. The Canadian Supreme Court said:
>
> > It is open to this court to 'develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution': Dolphin Delivery ... I am, therefore, of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter (the Canadian Charter of Human Rights). Given that publication bans by their very definition, curtail the freedom of expression of third parties, I believe the common law must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:
> >
> > A publication ban should only be ordered when:
> >
> > (a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, 'because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban (per Lamer CJC, at pp 37–38).
>
> [38] These persuasive principles, emanating from such an illustrious court, can be considered as forming a good jurisprudential basis to decide cases such as the present. I cannot believe the sensitivities of the average Malaysian can be so different so as to incline us to adopt a completely different juristic approach which relegates freedom of expression below the sub judice rule.

[55] However, it bears emphasis that the instant application concerns a gag order in the nature of a prior restraint. However, the test is not very different. In *Sahara India Real Estate Corp Ltd* the Supreme Court of India had this to say:

> 30. The question of prior restraint arose before this Court in 1988, in the case of *Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers Bombay (P) Ltd* AIR 1989 SC 190 in the context of publication in one of the national dailies of certain articles which contained adverse comments on the proposed issue of debentures by a public limited company. The validity of the debenture was sub judice in this Court. Initially, the court granted injunction against the press restraining publication of articles on the legality of the debenture issue. The test formulated was that any preventive injunction against the press must be 'based on reasonable grounds for keeping the administration of justice unimpaired' and that, *there must be reasonable ground to believe that the danger apprehended is real and imminent. The Court went by the doctrine propounded by Holmes J of 'clear and present*

A *danger'*.This Court treated the said doctrine as the basis of balance of convenience test. Later on, the injunction was lifted after subscription to debentures had closed. (Emphasis added.)

B **[56]** The test is not in substance different in other jurisdictions. Thus in Canada, the Supreme Court in *Dagenais,* the case referred to in *Syarikat Bekalan Air Selangor* held that an application for a publication ban must show it is necessary to avoid a real and serious risk to the fairness of trial and that it cannot be achieved by any alternative measures, and that the positive and negative effects of the ban are proportionate.

C

[57] This is also similar to the test followed by the English Courts when dealing with necessity for postponement orders under the UK Contempt of Court Act 1981 (see for example, a very recent Court of Appeal decision in *R v Sarker and another* [2018] 4 All ER 694; [2018] EWCA Crim 1341). Even in
D the United States, albeit with the benefit of the First Amendment to the Constitution, the Supreme Court in *Nebraska Press Association v Hugh Stuart* 96 S Ct 2791 (1976) had held that prior restraint may properly only be allowed when it is necessary to prevent prejudicial publicity that poses 'a clear
E threat to the fairness of trial'.

[58] These cases show that for a postponement order and prior restraint situation, like the gag order sought for herein, there is a heavier burden to justify the granting of the ban. *Sahara* for instance mentioned approvingly of
F the risk being 'clear and present danger' as well as 'immediate'. The US Supreme Court in *WXIA-TV v State of Georgia* 811 SE 2d 378 (Ga 2018), a case referred to by the respondent, held that prior restraint is permissible only if narrowly tailored to avoid 'a clear and present danger or serious and imminent threat' to a competing interest.

G

[59] In my view, the time element of the immediacy of the risk or threat of the prejudice is especially pertinent when one seeks a prohibition which involves a pre-emption and prior restraint order like presently, where anyone who breaches the gag order itself would be in contempt as opposed to a
H situation in the absence of a gag order where action for contempt is taken because of and after the actual commission of the contemptuous act. The heavier burden of showing the immediacy of the threat is therefore applicable for applications for gag orders.

I **[60]** Thus, in my judgment, in light of judicial precedents and authorities, in order to determine the justifiability of prohibiting discussion or publication of a matter alleged to be *sub judice*, the test to be satisfied is to answer the question whether the prohibition, in the nature of a pre-emptive prior restraint, like the present gag order, *is necessary to prevent an immediate threat of a real and*

substantial risk of serious prejudice to the administration of justice in the relevant proceedings, in the absence of alternative measures, and is proportionate in reference to the competing interests of free speech and risk of prejudice to a fair trial.

Application of the test — Relevance of jury trials

[61] A key argument of the respondent against this application is that the *sub judice* rule does not apply because there are no jury trials in this country. This specific issue is important in the evaluation of whether there is a real and substantial risk of a serious prejudice to a fair trial of the applicant.

[62] Being of common law origin, the *sub judice*rule has always been concerned with criminal trials precisely because the ultimate fact finders and decision makers were a panel of jury which comprised laymen. The exposure of a jury of lay persons who are untrained in the law to unfairly prejudicial comments and statements might affect their minds and deliberations so as to render a fair trial potentially unlikely.

[63] There is however no jury in criminal trials in Malaysia since 1995. Presently, every case is tried by a single judge, who is constitutionally duty bound upon taking the oath of judicial office to consider only the evidence presented in court, and disregard all extraneous matters. Thus, the possibility of prejudice from unwarranted publications in the case of non-jury trials like in the case of Malaysia is unmistakably remote.

[64] No doubt judges are also humans and are by no means infallible; but it is worthy of emphasis that a judge in the discharge of his or her judicial responsibilities must consider only the facts and the law applicable to a particular case before him or her. A judge cannot and must never succumb to public opinion.

[65] But even for jury trials, to be fair to those in this country who had in the past been called up to serve as jurors, I am reminded of the following observation of Lord Taylor in *Ex parte Telegraph plc and other appeals* [1993] 2 All ER 971:

> In determining whether publication of a matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's discretion to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in case of notoriety, are limited and that the nature of a trial is to focus the jury's mind on the evidence put before them rather than on matters outside the courtroom ...

[66] And I must also repeat the lucidity in Lord Denning MR's statement in respect of the principle governing restriction of publication under the contempt of court legislation in the UK vis a vis the position of the jurors and the judges in *R v Horsham Justices, ex parte Farquharson and anothe* [1982] 2 All ER 269, as follows:

> Whoever has to consider it should remember that at a trial judges are not influenced by what they may have read in the newspapers. Nor are the ordinary folks who sit as juries. They are good, sensible people. They go by the evidence that is adduced before them and not by what they may have read in the newspapers. The risk of being influenced is so slight that it can usually be disregarded as insubstantial ...

[67] In Malaysia, on the same point, the Federal Court decision in *Loot Ting Yee v Tan Sri Sheikh Hussain bin Sheikh Mohamed & Ors* referred to earlier made this especially pertinent observation:

> We cannot therefore see that the fair and proper trial of the issues in the pending action would be in any way hampered or adversely affected by the 'show cause notice'. *The trial is to be by a judge alone; it is proper to assume he will not be improperly influenced in any way. Prospective or potential witnesses would not be deterred or discouraged from contributing their testimony, for there is no reason to suppose that the substance of their evidence or their readiness to contribute will be affected or in any way impaired. Such witnesses are either credible and reliable or they are not. Our adversary system of justice in which evidence is elicited by examination and cross-examination provides the means of demonstrating the character and quality of the witnesses.* We are accordingly left with no impression of lurking danger of the kind we have mentioned. (Emphasis added.)

[68] And similarly in *Syarikat Bekalan Air Selangor Sdn Bhd*, also referred to earlier, the High Court made it clear thus:

> [27] Part of the practical realities also relates to the demise of the jury system in Malaysia. In a jurisdiction such as in Malaysia, the evaluation of the risk to administration of justice has to consider that it will be a professional judge who will be the person ultimately to be addressed, not jurors.
>
> ...
>
> [35] If I may add, it is all a matter of proportion and circumstance. If a comment attacks the merits of an ongoing litigation, for example, or cast aspersions on the independence and integrity of the judiciary and the judicial process in the context of an ongoing active suit, there will obviously be a breach of the sub judice rule and will be an act of contempt, as was the case in *Murray Hiebert*.
>
> [36] I cannot find these elements here. In a larger constitutional context, the law of contempt must necessarily bend to the higher liberty of freedom of expression, not the reverse.
>
> ...
>
> CONCLUSION

> [39] As I said at the outset, the preliminary governing principles on sub judice and contempt require the court to tread very carefully when an allegation of contempt or to commit a citizen to prison for it, comes before the court. The court has be satisfied on a high burden of proof that the administration of justice has been sullied or compromised. *Ultimately, the test of possible or likelihood of prejudice has to have reference to the professional judge who will be hearing the case, not a collection of layman jurors — a system which has ceased to exist in our system of civil litigation.* I would have thought it will require more than a criticism of a litigant in a media of limited circulation (such as *Harakah*) to influence a judge to be somehow prejudiced against the litigant criticised. (Emphasis added.)

[69] I should add for emphasis that jury trials have also been abolished for criminal cases in this country. I would not go so far as saying that *sub judice* has no application in Malaysia. I think that is quite misconceived. However, the absence of jury trials does principally mean that the scope for the application of the *sub judice* rule is decidedly more circumscribed in the Malaysian justice system.

[70] As for the concern on the unwarranted publicity influencing the witnesses, as mentioned by the Federal Court in *Loot Ting Yee*, the witnesses to be called to testify will in any event turn out to be either reliable and credible or otherwise, pursuant to the time-honoured process of examination-in-chief, cross-examination and re-examination by prosecution and the defence. Decisions of the judge will also no doubt be subject to the appeal process.

[71] However, notwithstanding the absence of jury trials, which I agree would substantially remove the concerns about the possibility of decision makers being influenced by extrinsic matters, publications and statements which can still be shown to carry a real and substantial risk of seriously prejudicing and pre-judging the issues at stake before the courts may still be in criminal contempt of undermining the course of justice.

[72] As I have mentioned, one of the key objectives of the *sub judice* rule is to prevent the usurpation of the role of the courts in adjudicating disputes including in criminal trials. Therefore even in the absence of jury trials, the proper administration of the criminal justice system could still be adversely interfered with if, to take an extreme example, the media, mainstream and alternative were free to discuss and evaluate the evidence adduced in court in an on-going trial and comment on the credibility of the testimony of witnesses, and suggest what ought to be done by prosecutors, counsel and the judge, even where they went wrong, all in a special segment of the prime time evening news on television on daily basis throughout the proceedings. This state of affairs is manifestly not one to be countenanced by any justice system.

[73] Nevertheless, I reiterate that in determining whether there is an

immediate threat of a real and substantial risk of serious prejudice to the due administration of a fair trial for the applicant and the criminal justice system in the country, the fact of the absence of jury trials would in my view make the case for a gag order against publication and discussion of the criminal charges against the applicant considerably much more difficult to establish.

The pre-trial publicity in this case — Whether immediate threat of a real risk of serious prejudice established

[74] In support of the application, the applicant has exhibited to his affidavit in support, voluminous documents of almost 1,000 pages which contain the many and various written articles and comments with varying degree of relevance to the subject matter of the criminal charges.

[75] For completeness on the categorisation, these are the articles which concerned more with the subject matter of the charges (exhibited in DSN2), articles which delved into the investigation by the Malaysian Anti-Corruption Commission (DSN3), comments made by public figures on allegations against the applicant (DSN4), articles on other allegations (DSN5), articles on comments made by the attorney general before (DSN6), and after his appointment as the attorney general (DSN7), comments by members of the public (DSN8), and an article on an interview given by the applicant himself (DSN9).

[76] The extent of media publicity and campaign however does not automatically mean there would be serious prejudice to the impending proceedings. If *Nebraska Press Association* is to provide the requisite guidance, the US Supreme Court had observed that pre-trial publicity, even if deemed to be concentrated and pervasive, could not be readily said to result in an unfair criminal trial.

[77] In my evaluation, no clear evidence, other than the applicant's own averments, has been shown in the affidavit in support that the various publications and reports complained about can be said to present an immediate threat of a real and substantial risk of serious prejudice to the applicant's right to a fair trial or to the administration of justice.

[78] The lead counsel for the applicant gave much emphasis on the articles and online portal news-reports which were exhibited and found objectionable by the applicant, including a multitude of comments, a selection of which were read out at the hearing by the lead counsel for the applicant. But these were almost entirely in the form of personal opinions expressed anonymously which could and probably should readily be rejected outright.

[79] To the extent that the comments the applicant found to be blatantly prejudicial, grossly unfair, and even utterly rude and disdainful are almost entirely anonymous, the argument that the risk of prejudice is substantial is on the contrary, rendered much weakened. This is no basis for the grant of a gag order.

[80] Even more crucially, based on the exhibits, this widespread and arguably pervasive publicity, especially generated and probably originated from Sarawak Report is dated since as far back as 2014, more than three years ago. These accusatory articles have been in the public sphere for some time already, thus in my view negating the element of immediacy of the threat of real risk of serious prejudice to a fair trial of the applicant.

[81] Significantly, the applicant himself (as well as his family members and even his counsel) has given interviews which have been widely and extensively published, attempting to answer the allegations made against him, and presenting his version of the narrative. These interviews could have probably attracted far greater public and media interest than the less than current allegations against the applicant that have surfaced for a number of years already.

[82] This suggests the existence of a balanced reporting of the rival views on the matter. Indeed, as highlighted by the respondent, the applicant himself in his affidavit, averred that he gave interviews to the press in order to offset public opinion said to have been prejudiced. This state of affairs thus further weakens the position of the applicant, as it renders the risk of serious prejudice to his trial to be far from apparent.

[83] And neither can it be readily assumed that if not for the interim gag order granted on 4 July 2018, there would already have been wide and unfair publicity after the registration of the four initial charges. Nor, as I have said, has any action been taken by the applicant against the alleged transgressions. I also cannot entirely disagree with the respondent's contention that the proposed gag order appears more to protect the applicant's reputation and standing as a former leader of the nation but less to do with safeguarding the administration of justice.

[84] This runs counter to the essence of this general observation of the House of Lords in the leading case of *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54; [1974] AC 273, a case of contempt proceedings against media publication, as expressed by Lord Reid in the following terms:

> The law on this subject is and must be founded entirely on public policy. *It is not there to protect the private rights of parties to a litigation or prosecution.* It is there to prevent interference with the administration of justice and it should in my

judgment be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be a real prejudice to the administration of justice. (Emphasis added.)

[85] In addition, the publicity complained of does not cast aspersion on the integrity of the administration of the criminal justice system. In fact, many of the comments directly or indirectly acknowledged the necessity for the courts to adjudicate and give their verdicts on the criminal charges. There is nothing beyond the frivolous that has been shown to constitute a threat to the character and status of the court as a court of justice.

[86] In my assessment, the notice of motion and the affidavit in support fall short of establishing the presence of an immediate threat of a real and substantial risk of serious prejudice to a fair trial for the applicant and the due of administration of justice. The case for the gag order cannot succeed and therefore must fail.

Ready availability of remedies in contempt and defamation laws

[87] Not only that. The case for a gag order is unwarranted because of another key reason. It is this. Legal remedies are already available. Contempt laws and defamation laws can be resorted to if publications are deemed to be either contemptuous or defamatory, as the case may be.

[88] It is imperative to appreciate that the availability of these laws apart, the applicant is seeking to prevent future or potential publications which may be prejudicial to his case. As stated earlier, whilst the courts may have the powers to issue a gag order in the nature of a prior restraint instead of dealing with what has already been committed, the granting of the order can never be automatic, bears a heavier burden, and must balance competing interests, and show absence of alternative measures.

[89] This is one such aspect. The option of the applicant calling in aid the invocation of contempt and defamation laws is always there and readily available. There is, as mentioned earlier, nonetheless no evidence to show that the applicant has taken any legal action against those whom he deemed to be responsible for the many allegedly prejudicial articles as exhibited in his affidavit in support to this application.

[90] The availability of existing laws of contempt and defamation therefore renders the case for a pre-emptive form of a gag order very much less

compelling. This in my judgment considerably weakens the case for the gag order, additional to what the law of contempt and defamation already provide for.

[91] I would agree with the lead counsel for the applicant that the possible alternative measures of postponing trial to a later date or to change the venue of the hearing would make little difference to the necessity to ensure a fair trial to the applicant. This is especially since that it would also be in the interest of an accused to have an early trial. Indeed, it was observed by the English Court of Appeal that bringing a widely publicised case to trial as early as possible would help avoid the potentially prejudicial effects of a trial by media.

[92] Thus in *Hodgson and others v Imperial Tobacco Ltd and others* [1998] 2 All ER 673, Lord Woolf MR, delivering the judgment of the court stated:

> ... The best way of avoiding ill-informed comments in the media in the case of this nature when the interest of the public is high, is for the court to be as open as is possible and practicable, not only in relation to the trial but also in relation to the interlocutory proceedings which have to take place prior to that trial. The other action which can be taken to reduce the risk of trial by media and the absence of co-operation between the parties affecting the conduct of the proceedings is to ensure that as soon as is practical a timetable is laid down for bringing the case to trial as early as possible and giving any directions to the parties which are necessary in order to require them to co-operate in achieving this. The longer the trial is delayed the greater the opportunity for both sides to engage in tactical manoeuvres which have nothing to do with achieving a fair trial.

Balancing exercise — Constitutional right to free speech and expression

[93] As an immediate threat of serious prejudice has not been shown, and the availability to other remedies have instead been established, both therefore resoundingly already demolish the case for a gag order. For completeness, I would nevertheless briefly deal with the component of the test on balancing the competing interests.

[94] It must always be remembered that art 10(1)(a) of the Federal Constitution clearly guarantees the right to freedom of speech and expression, which includes the freedom of the press.

[95] This at first blush then appears to be on collision course with the objective of the gag order which is said to prevent the risk of prejudice to a fair trial of the applicant. But freedom of speech and expression in this country does not mean that everyone is free to discuss and comment and publish on everything and anything about this or other pending trial proceedings. Article 10 is not absolute.

[96] For it is manifest that art 10(2)(a) of the Federal Constitution itself provides for exceptions such that the freedom of speech and expression is subject to other laws, which, relevant to present context, include especially laws on defamation and contempt of court. As such, those who overstep the boundary of legitimate expression and speech on this case risk action being taken for violations of defamation or contempt laws, potentially both civil and criminal.

[97] Nevertheless since the threat of a real risk of serious prejudice has not been established, and the laws on contempt and defamation are instead sufficient remedies to deal with the complaint of the applicant, it is inescapable that the granting of a gag order under such circumstances would be totally disproportionate for it risks infringement of the right of free speech and unnecessarily curtails public discussion of a matter of great public interest at the expense of the unfounded allegation of an immediate threat of a real risk of serious prejudice to the fair trial of the applicant.

[98] When the case is of great public interest, like this case unquestionably is, the extent of the freedom of public discussion of the case becomes the test on the true extent of the adherence to the constitutional ideals as expressed in the Federal Constitution. Public discussion must not be prohibited and silenced.

Open justice system

[99] In addition, the proposed gag order, in terms being applied for, also does not sit comfortably with the provision of s 15 of the Courts of Judicature Act 1964 which requires the courts to be open and public. This embodies the universally cherished open justice system applied in most democracies.

[100] For a criminal trial like the one before this court where the state through the public prosecutor is prosecuting on behalf of society, members of the society, being the public, have the right to observe the proceedings and judge for themselves whether an accused is being afforded a fair trial. The open justice concept also involves the right of the media to report on judicial proceedings, in fulfilment of the public's right to information on trial proceedings.

[101] There are of course exceptions to the requirement of open justice in cases involving the interest of justice, public security and public safety. But these usually concern cases on terrorism and sexual offences against children.

[102] Banning discussions and publication of matters concerning the proceedings in terms of the notice of motion applied for would potentially infringe this fundamental principle of open justice.

Balancing the competing interests

[103] Ultimately, in considering the proportionality of the gag order sought by the applicant in respect of the contention of an immediate threat of a real and substantial risk of a serious risk to a fair trial as against the right to free speech and expression, and in balancing the constitutional conflict between achieving a fair trial to the applicant on the one hand, and upholding the freedom of speech and expression on the other, in our jurisdiction, in my judgment, in this case, considering the well-researched arguments put forth by the applicant and the respondent, greater emphasis should be given on the fundamental principle of freedom of speech and expression and that of open justice.

[104] This must almost necessarily follow from my other key findings in that an immediate threat of a real and substantial risk of serious prejudice to the fair trial has not been established, to a large part also due to the absence of the jury system in this country, as well as that the ready and adequate availability of remedies to the applicant under the law of contempt and defamation militate against the grant of a prior restraint type gag order.

[105] When considered in the context that I have just described, a gag order would therefore represent a further extension of what is already governed by existing law of contempt. In that sense it is unjustified as it is superfluous. Whilst I do not disagree with the lead counsel for the applicant that the court in this country may be said to have the jurisdiction to grant a pre-emptive order or a prior restraint, such power can only be exercised in special or exceptional circumstances.

[106] As gag orders are in the nature of prior restraints on the freedom of speech and freedom of the press, a party proposing for such a gag order like the one sought by the applicant in this case bears a heavy burden of providing a compelling justification for making that restriction which in my view could only be granted in the most exceptional of cases.

Other defects

[107] The proposed gag order suffers from other infirmities. First, it seems clear that the gag order is intended to be directed at the world at large by virtue of the prayer 'any person who shall publish and/or cause to be published in the media'. However, case law authorities suggest that this could be a problem.

[108] In *Attorney General v Leveller Magazine Ltd and others* [1979] 1 All ER 745 it was held that a court had no power to pronounce to the public at large a prohibition against publication that all disobedience to it would

automatically constitute a contempt (see also the Privy Council decision in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago and another; Trinidad and Tobago News Centre Ltd and others v Attorney General of Trinidad and Tobago and another* [2005] 1 AC 190 mainly to the same effect).

[109] A gag order should only be permitted if it is precisely defined, narrow in scope and be in specific response to the need to prevent a substantial and risk of serious prejudice to the due administration of justice in a trial proceedings. A widely drafted gag order, like the one before this court, does not seem to be designed to address a well-defined and clearly identified threat of a real risk of serious prejudice to the proper administration of justice in trial proceedings.

[110] And there is also in any event little utility in issuing a gag order that cannot be meaningfully and fully enforced. Reports originating from outside jurisdiction for example cannot be subject to any effective or meaningful restraint even though they may be instantaneously readable to the public in Malaysia.

[111] Further, I cannot but agree with the submission by the learned DPP for the respondent that a careful review of the notice of motion and the affidavit in support reveals a certain inconsistency. The former by its clear words seek to bar any person from committing the acts specified in the notice of motion and to cite for contempt any person deemed to have committed the acts outlined therein.

[112] The scope is clearly wide. It is stated to be targeted against any person who publishes or communicates in whatever form any words, comments, discussions or statements which would suggest the applicant had undertaken any of the matters stated in the criminal charges filed against him.

[113] However the averments in the affidavit is support do not exactly correspond with the scope of the notice of motion in all respects. The applicant in his affidavit in support clearly averred that he is not praying for fair and accurate reporting be restrained and that the prohibition should apply to publication and comments which would be favourable to the applicant as well. This point was also repeated by his lead counsel at the hearing. In any event the inconsistency means that the notice of motion is not fully supported by the affidavit in support.

CONCLUSION

[114] Accordingly, I reiterate that in this case, in respect of a proper determination of the question whether the wide publicity of the matters related to the criminal charges levelled against the applicant warrants this court

granting a gag order in the nature and terms applied for, my answer is in the negative for the principal grounds that I now repeat and summarise in the paragraphs that follow.

[115] First, the applicant has not successfully established, despite the many exhibits, that this extensive media publicity represents an immediate threat of a real and substantial risk of serious prejudice to the administration of justice in the impending trial of the applicant, more so in cases involving prior restraint like presently where the burden to justify one is even heavier. The substantial risk of serious prejudice is in any event considerably diluted and very much diminished by the absence of jury system in Malaysia.

[116] Secondly, alternative and effective measures other than in the nature of a prior restraint are readily available to the applicant, in the form of remedies under the laws of contempt and defamation to deal with any such substantial risk of prejudice or interference with the criminal justice system. Actions can be taken against those who violate these laws by undermining the due administration of justice in the trial.

[117] Thirdly, a fair and balanced consideration of competing interests in this case would lead to the almost inevitable conclusion that the specific terms of the gag order applied for, if granted, would for all intents and purposes, represent a major incursion on the constitutional right of freedom of expression and speech under art 10 of the Federal Constitution, as well as tantamount to an unjustified departure from the open justice principle of s 15 of the Courts of Judicature Act 1964.

[118] Fourthly, the proposed gag order is also difficult to sustain given the unduly wide scope of the intended prohibition, which is in effect targeted at the whole world. This is quite apart from the technical flaw that the scope of the proposed gag order stated in the notice of motion is inconsistent with and significantly wider than what has been affirmed in the accompanying affidavit in support.

[119] In my view, a gag order, under these circumstances, does not promote the objective of the law as an instrument of justice.

[120] In view of the foregoing reasons, I hereby dismiss the application.

Application dismissed.

Reported by Ashok Kumar